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No. 91-816

IN THE

Supreme Court of the United States

OCTOBER TERM, 1991

STATE OF NEW YORK; Edward V. Regan, Comptroller of the State of New York; Robert Abrams, Attorney General of the State of New York,

Petitioners,

vs.

ASSOCIATION OF SURROGATES AND SUPREME COURT REPORTERS WITHIN THE CITY OF NEW YORK, et al.,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF IN OPPOSITION TO THE PETITION

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QUESTION PRESENTED[1]

Where a Federal Court has declared a state statute delaying the payment of wages to State employees in violation of collective bargaining agreements to be a violation of U.S. Const. art. I, §10, can the Court order State officials to make payments on a current basis?

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[1] The "question presented" by the Petitioners is predicated upon the erroneous representation that the United States Court of Appeals for the Second Circuit ordered restitution of the wages which were withheld from November 7, 1990 through March 13, 1991 in order to implement the lag payroll law, which required that wages be paid two weeks after they have become due. As described more fully in the Statement of Facts, the 10 days' wages which were withheld were repaid on March 27, 1991 in lieu of paying the wages which were due for the two week pay period ending March 27, 1991. Wages which had been due on March 27, 1991 were paid two weeks later, commencing the lag payroll mandated by statute. Compliance with the Court order required only that subsequent to the Court order wages be paid when due, and the Petitioners complied with the Court order on October 23, 1991 by paying the wages due for the two week pay period ending on October 23, 1991 as well as the wages due for the two week pay period ending on October 9, 1991. (Petition, fn.2)

TABLE OF CONTENTS

	Page
QUESTION PRESENTED	i
TABLE OF AUTHORITIES	v
STATEMENT OF THE CASE	2
REASONS FOR DENYING THE PETITION	3
1. The Relief Ordered by the Court was Prospective and does not Raise a Genuine Issue Under the Eleventh Amendment	3
2. The Payment of Wages was on a Current Basis has Rendered Moot the Only Issue Raised in the Petition	5
3. The Petitioners have not Demonstrated Special and Important Reasons for the Grant of a Writ of Certiorari	7
CONCLUSION	8

TABLE OF AUTHORITIES

	Page
Burnett v. Kindt, 780 F.2d 952, 954-955 (11th Cir. 1986)	6
Butcher v. Bailey, 753 F.2d 465, 471 (6th Cir. 1985)	6
DeFunis v. Odegaard, 416 U.S. 312, 94 S.Ct. 1704, 40 L.Ed.2d 164 (1974)	6
Edelman v. Jordan, 415 U.S. 615, 665 94 S.Ct. 1349, 13 L.Fd.2d (1974)	*passim*
Honig v. Students of Cal. School for the Blind, 471 U.S. 148, 105 S.Ct. 1820, 85 L.Ed.2d 114 (1985)	6
Koger v. U.S., 775 F.2d. 1095 (4th Cir. 1985)	6
Murphy v. Hunt, 455 U.S. 478, 102 S.Ct. 1181, 71 L.Ed.2d 1982	6
Olson v. U.S., 872 F.2d 820, 823 (8th Cir. 1989)	6
Philadelphia Police and Fire Ass'n for Handicapped Children, 874 F.2d. 156, 162 (1989)	6
Toll v. Mareno, 458 U.S. 1, 102 S.Ct. 2977 73 L.Ed.2d. 563 (1982)	7
University of Texas v. Camenisch, 451 U.S. 390, 101 S.Ct. 1830, 68 L.Ed. 175 (1981)	6

Page

FEDERAL CONSTITUTIONAL PROVISIONS, STATUTES AND RULES:

U.S. Const. amendment XI ..... *passim*

S.Ct. R. 10 (1)(a) 7

NEW YORK STATUTES AND REGULATIONS:

L. 1990 Ch. 190 §375 ..... *passim*

L. 1990 Ch. 166 §382, as amended by L. 1991, C. 171 §1 4

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BRIEF IN OPPOSITION TO THE PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Respondents respectfully pray that the Petition for a Writ of Certiorari to review the judgment and opinion of the United States Court of Appeals for the Second Circuit entered in this action on July 31, 1991 be denied.

STATEMENT OF THE CASE

The United States Court of Appeals for the Second Circuit reversed the judgment of the district court and remanded the case with instructions "to (1) enter a declaratory judgment declaring that New York's lag-payroll law violates the contract clause of the United States Constitution; (2) enjoin the continuing effects and application of the lag-payroll law; and (3) enter an appropriate judgment for the plaintiffs which shall include restitution of lagged wages for all affected employees" (20a).[2] The State of New York and Edward V. Regan, as Comptroller of the State of New York, have not challenged the declaration of unconstitutionality or the injunction and petition for a Writ of Certiorari only to review whether "the restoration of previously withheld wages constitute[s] retroactive monetary relief barred by the Eleventh Amendment". (Petition, question presented)

In arguing that the restoration of lagged wages violated the Eleventh Amendment, the Petitioners have described inaccurately the lag payroll statute, the manner it was implemented, and what was done by state officials to pay employees on a current basis in accordance with the Court order.

The collective bargaining agreements between the Respondent unions and the Petitioners require that employees be paid every second Wednesday for the two week period ending on the date of payment. The lag payroll statute, L. 1990 Ch. 190 §375, provides that commencing at least 14 days before March 31, 1991 "the salary or wages. . . shall be payable by the state two weeks after they shall have become due". Rather than implement the statute simply by skipping one bi-weekly paycheck, which would have resulted in employees not being paid for four weeks the Petitioners used an alternative procedure: they withheld one day's pay in each of the ten bi-weekly pay periods beginning with the pay period ending November 7, 1990 and continuing through the pay period ending March 13, 1991;[3] thereafter on March 27, the Petitioners returned to employees the money

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[2] References to "__a" are to the appendix of the Petition

[3] Joint Appendix filed in Court of Appeals (hereinafter "JA.____" 56, 88-89, 103)

withheld between November 7, 1990 and March 13, 1991 but did not pay wages for the period ending on March 27, 1991. Payment for the pay period ending on March 27, 1991 was made two weeks later, and thereafter wages were paid two weeks after they had become due.

This action was commenced on or about October 4, 1990 (JA. 4). The district court (Patterson, J.) granted judgment to the Petitioners herein on October 26, 1990 (34a). On July 31, 1991, the Court of Appeals for the Second Circuit reversed the judgment of the district court. On October 23, 1991, the Petitioners, in accordance with the lag payroll statute, paid employees for the two week period ending on October 9, 1991. On October 23, 1991, the Petitioners also paid employees for the two week period ending on October 23, 1991, thereby complying with the order of the Court to pay wages on a current basis. (Petition at 8.) The "restoration" was accomplished simply by paying on a current basis wages due subsequent to the order of the Court. The money which was "restored" to employees on October 23, 1991 was money which was due employees for the pay period ending on October 23, 1991 and did not represent the repayment of money withheld prior to the order of the Court.

REASONS FOR DENYING THE PETITION

The Petition for a Writ of Certiorari should be denied for three reasons: first, the relief ordered was prospective and does not raise a genuine issue under the Eleventh Amendment; second, the wages are now being paid on a current basis so that any issue which could have been raised is moot; and third, the Petition does not demonstrate any special and important reason for the grant of a Writ of Certiorari.

1. *The Relief Ordered by the Court was Prospective and does not Raise a Genuine Issue Under the Eleventh Amendment*

The Petition is predicated upon a misunderstanding by the Petitioners of the lag payroll statute, the manner it was implemented, and what was done to pay wages on a current basis.

The Court directed only that after the date of the Court order, payment be made on a current basis. Since the order is prospective and not retroactive, it is consistent with the Eleventh Amendment. *Edelman v. Jordan*, 415 U.S. 651, 665 94 S. Ct. 1349, 13 L.Fd.2d (1974).

The Court order required only that payments which were due subsequent to the date of the Court order be paid in accordance with the collective bargaining agreements, to wit: every second Wednesday for the two week payroll period ending on the date of payment. The Court order was, in fact, implemented on October 23, 1991 by the Petitioners by paying employees for the two week pay period ending on October 23, 1991. The only way that the Petitioners could have rescinded the lag payroll was to pay employees on a current basis. The payment made on October 23, 1991 brought the Petitioners into compliance with the order of the Court. Based upon the foregoing, it is clear that the Court did not order retroactive payments. Rather, the Court ordered that future payments be made on a current basis.

The Petitioners' claim that the "restored wages" were the wages which had been withheld between November 7, 1990 and March 13, 1991 is clearly erroneous. The statute provides that prior to March 31, 1991 "the salary or wages. . . shall be payable. . . two weeks after they shall have become due". The Petitioners acknowledge that "the two week lag commenced on March 14, 1991," (Petition at 4), referring to the first day of the first pay period for which wages were not to be paid on a current basis. The lag payroll was implemented by not paying on March 27, 1991 the wages due for the two week pay period ending on March 27, 1991, and by instead returning the money withheld during the previous ten pay periods. Thereafter the wages were paid two weeks after they had become due. If the state had continued to hold the money it had withheld from November 7, 1990 through March 13, 1991, then wages would thereafter have been paid on a current basis and not two weeks after they had become due. *Compare* the requirement that wages be paid 2 weeks after they have become due with the requirement in a subsequent wage withholding statute L. 1991, C. 166 §382, as amended by L.1991, C. 171, §1, that one day's pay was to be withheld during each

of five pay periods and repaid upon termination of employment, but that wages would be paid when otherwise due. The Petitioners argued to the Court of Appeals for the Second Circuit that the wages to be "restored" were the wages withheld between November 7, 1990 through March 13, 1991, and that Court explicitly rejected the argument (18a-19a).

The fact that the state has to spend money it would prefer not to have spent does not create a violation of the Eleventh Amendment. *Edelman v. Jordan*, 415 U.S. at 667-668. Based upon the foregoing, the Petitioners have failed to raise a genuine issue under the Eleventh Amendment.

2. *The Payment of Wages on a Current Basis has Rendered Moot the Only Issue Raised in the Petition.*

The Petitioners do not seek review of the decision of the Court of Appeals for the Second Circuit declaring that the lag payroll is unconstitutional and enjoining the continuing effects and application of the lag payroll law. The Petition is limited to challenging the jurisdiction of the Court to order what it alleges to be "a retroactive payment of moneys from the New York State treasury". (Petition at 8.) Since the Petitioners have already complied with the order to pay wages on a current basis, the defense is moot.

During the pendency of the appeal to the Court of Appeals for the Second Circuit, the lag payroll was implemented. While the case was *sub judice* the Petitioners raised the argument that the Court lacked jurisdiction since the lag payroll was fully implemented and no retroactive payment could be ordered from the state treasury. In its opinion, the Court of Appeals rejected this argument. No stay was requested. Thereafter on or about October 23, 1991, the Petitioners paid employees for the pay period ending October 23, 1991 as well as for the pay period ending October 9, 1991. (Petition at 5, fn. 2)

The law is well established that full compliance with an injunction amounting to the entirety of the relief sought renders

an issue moot. *Honig v. Students of Cal. School for the Blind*, 471 U.S. 148, 105 S.Ct. 1820, 85 L.Ed.2d. 114 (1985) (appeal moot because terms of preliminary injunction have been fully and irrevocably carried out); *Defunis v. Odegaard*, 416 U.S. 312, 94 S.Ct. 1704, 40 L.Ed.2d. 164 (1974) (appeal of order that applicant to law school be admitted was moot because he had irrevocably been admitted to final term of final year); *University of Texas v. Camenisch*, 451 U.S. 390, 101 S.Ct. 1830, 68 L.Ed. 175 (1981) (appeal moot because terms of preliminary injunction have been fully and irrevocably carried out); *Murphy v. Hunt*, 455 U.S. 478, 102 S.Ct. 1181, 71 L.Ed.2d. 1932 (claim to pretrial bail was moot upon conviction); *Philadelphia Police and Fire Ass'n for Handicapped Children*, 874 F.2d. 156, 162 (1989) (appeal of contempt order requiring Pennsylvania to make two payments to the City of Philadelphia was moot after payments were made); *Koger v. U.S.*, 755 F.2d 1095 (4th Cir. 1985) (appeal of action to enjoin the Government from collecting assessed tax deficiencies and seeking release of tax lien was rendered moot by full payment of assessed deficiencies); *Olson v. U.S.*, 872 F.2d 820, 823 (8th Cir. 1989) (submission of materials in compliance with IRS summons renders moot any constitutional objection to compelled submissions); *Butcher v. Bailey*, 753 F.2d 465, 471 (6th Cir. 1985) (compliance with an order requiring debtor to turn over records in bankruptcy case mooted an appeal claiming privilege against self-incrimination); *Burnett v. Kindt*, 780 F.2d 952, 954-955 (11th Cir. 1986) (voluntary compliance by warden with *writ of habeas corpus* mooted relief).

Since the Petitioners do not challenge the declaratory judgment and the injunction, there is no question that any money withheld pursuant to the lag payroll statute would be lawfully due to the employees. It would be inequitable and inappropriate for any court to order the employees to repay money to which they are unquestionably entitled. The absence of any other possible relief for the Petitioners makes the defense now raised moot.

Moreover, the graveman of the Petition is that federal court lacks jurisdiction to compel a state to use state funds to make reparations for the past. Since the money has already been paid, there is no longer a question of compulsion. The state made

the payments after having raised the issues unsuccessfully before the United States Court of Appeals for the Second Circuit both on appeal and in a Petition for Rehearing. The State failed to seek a stay. The letter allegedly preserving rights cannot protect against the issue becoming moot. Eleventh Amendment rights can be waived. *Toll v. Mareno,* 458 U.S. 1, 102 S.Ct. 2977 73 L.Ed.2d. 563 (1982)

The Petition seeks review only of the order that money be paid out, and does not seek review of the declaration of unconstitutionality or from the injunction against the maintenance of the lag payroll. In the event that the Court finds the defense raised in the Petition moot the Respondents respectfully request that the Petition be disposed of in a manner that preserves the judgment since the judgment provides for unchallenged declaratory and injunctive relief.

3. *The Petitioners Have Not Demonstrated Special and Important Reasons for the Grant of a Writ of Certiorari*

This Court has clearly established the parameters of the relief which a federal court may grant in a law suit against a state. *Edelman v. Jordan,* 415 U.S. 651, 665 94 S.Ct. 1347, 13 L.Ed.2d (1974) and cases cited by the Petitioners at fn. 3, 4.

The decision below recognizes and does not depart from the well-established principles of law. Nor is the decision in conflict with the decisions of other Circuits since all of the decisions cited by the Petitioners apply the same legal principle and do not apply the standard differently.

At most the Petitioners dispute the Court's interpretation of the lag payroll statute, which in no way can constitute a decision which "has so far departed from accepted and usual course of judicial proceedings. . . as to call for an exercise of the Supreme Court's power of supervision." Rule 10 (1)(a).

CONCLUSION

The Petition for a Writ of Certiorari to review the judgment and opinion of the United States Court of Appeals for the Second Circuit entered in this action on July 31, 1991 should be denied.

Dated: Commack, New York
December 20, 1991

Respectfully submitted,

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